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## **ATTACHMENT**

### **PAY RATES for ADMINISTRATIVE JUDGES of the BOARDS OF CONTRACT APPEALS**

#### **SHOULD A JUDGE'S PAY BE ADJUSTED BASED ON PERFORMANCE?**

A statement by the Senior Executives Association  
on behalf of  
The Administrative Judges of the Boards of Contract Appeals  
May 11, 2006

#### *Introduction*

Board judges believe that adjusting the pay of board judges based on specific performance standards is counter intuitive. However, board judges recognize that there are some who think that executive branch judges, like other members of the executive branch, should be paid based on whether judges individually meet specific performance standards. We offer our reasons for rejecting pay adjustments for performance for Board of Contract Appeals Judges.

#### *What are the Boards of Contract Appeals*

The Boards of Contract Appeals have a long history of resolving contract disputes between the government and its contractors. Originally, the boards were creatures of the Dispute Clause contained in government contracts. Board members were appointed by and reported to the Secretaries of the Departments. By the time the Contract Disputes Act of 1978 was passed, "the boards ha[d] evolved into trial courts, as the result of *S & E Contractors, Inc. v. United States*, (400 U.S. 1 (1972))." See S. Rep. No. 95-1118, 95<sup>th</sup> Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Ad. News, 5237-38.

The Contract Disputes Act gave statutory recognition to the trial court nature of the boards of contract appeals. In considering the Contract Disputes Act, Congress stated,

The agency boards of contract appeals as they exist today, and as they would be strengthened by this bill, function as quasi-judicial bodies. Their members serve as administrative judges in an adversary-type proceeding, make findings of fact, and interpret the law. Their decisions set the bulk of legal precedents in

Government contract law, and often involve substantial sums of money. In performing this function they do not act as a representative of the agency, since the agency is contesting the contractor's entitlement to relief.

See S. Rep. No. 95-1118, 95<sup>th</sup> Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Ad. News, 5260.

The legislative history in the U. S. House of Representatives was to the same effect.

The provisions outlined above concerning appeal from a decision of an agency board of contract appeals by the Government involves a basic change in the law and practice relating to contracts. It is consistent with the statutory basis in the bill for agency boards of contract appeals and their recognition as independent boards before which the Government and contractor can receive an impartial determination on the basis of an evidentiary hearing on the record.

See H.R. Rep. No. 95-1556, 95<sup>th</sup> Cong., 2d Sess., at 20.

The Contract Disputes Act changed the contract appeals process from a right provided by contract and subject to the discretion of the Secretary, to a right granted and governed by federal statute. While the agencies continue, under the Contract Disputes Act, to have the authority to establish the boards of contract appeals, they have no authority to approve, disapprove, or even review the decisions of the boards once they have been established. In this regard the board judges do not act under the Administrative Procedure Act (5 U.S.C. § 554) to implement an agency program. As the Federal Circuit Court of Appeals has noted, "In enacting the CDA, Congress explicitly stated that a board of contract appeals proceeding is not subject to the adjudicative procedure of 5 U.S.C. § 554." *Fidelity Construction Co. v. United States*, 700 F.2d 1379, 1316 (Fed. Cir. 1983).

Under the Contract Disputes Act the decisions of the boards of contract appeals may only be reviewed by an Article III court. All appeals go directly to the Federal Circuit Court of Appeals, except that maritime cases are appealed to district courts. (41 U.S.C. §§ 603, 607(g)) Once created, the boards perform their functions independently of the agency that has created them. Today, in 2006, there are ten agency boards of contract appeals. On January 6, 2007, eight civilian boards will be consolidated into the Civilian Board of Contract Appeals.

The structure of the various boards generally provides that the chairman has administrative responsibility for the operation of the board, including the assignment of cases. However, each judge acts independently in performing the quasi-judicial duty of deciding disputes between the government and the contractor. Each judge is a peer. There is no superior-subordinate relationship. This is similar to the relationship among the judges of an Article III court.

### Who are the Board Judges

Board judges are lawyers licensed to practice law who have significant experience in government procurement law. They are required by the Contract Disputes Act to have at least five years of such public contract law experience. (41 U.S.C. § 607(b)(1)).

Today, in 2006, there are approximately 49 board judges. Twenty-two of them are serving on the Armed Services Board of Contract Appeals. The remaining judges are serving on the Postal Service Board or will be serving on the new Civilian Board.

Technically, board judges are members of the Executive Branch. However, board judges have no responsibility for implementing programs or policies of the Executive Branch. In performing this function they do not act as a representative of any agency. *See* S. Rep. No. 95-1118, 95<sup>th</sup> Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Ad. News, 5260.

### What do Board Judges Do

Their responsibility is to render independent decisions on contract disputes between the government agency and the government's contractor. The Contract Disputes Act provides that board judges may be assigned other duties, but only if those duties are not inconsistent with their contract disputes act responsibilities. (41 U.S.C. § 607(a)(1)).

For example, the Agriculture Board of Contract Appeals also decides disputes arising out of standard reinsurance agreements between the Federal Crop Insurance Corporation and large insurance companies; the General Services Board of Contract Appeals also used to decided bid protest cases and currently also decide claims of federal civilian employees for travel and relocation expenses; and the Housing and Urban Development Board of Contract Appeals also decides the Department's Debt Collection actions (including tax offsets and administrative wage garnishments) and reviews of administrative sanctions (including debarments and suspensions). The Department of Interior Board of Contract Appeals is also required by statute (25 U.S.C. § 450m-1(d)) to decide disputes arising from Indian self-determination contracts (25 U.S.C. § 450f)) of the Department of Interior and the Department of Health and Human Services (25 U.S.C. § 450m-1(e)). The Armed Services Board of Contract Appeals also decides Non-appropriated Fund disputes that are not subject to the Contract Disputes Act, as well as certain NATO and Iraq Coalition Provisional Authority disputes.

### How do Board Judges Perform their Functions

Board judges are generally responsible for managing their dockets within the limits of the resources made available to them. Preparatory to issuing a decision, board judges resolve discovery disputes and other pre-hearing motions. If the contractor elects to have an appeal for a claim up to \$50,000 placed on the expedited docket, an individual judge is solely responsible for issuing the decision. (*E.g.*, *Wayne T. Palmer v. General Services Administration*, GSBICA No. 14063, 97-2 BCA ¶ 28,988 (May 12, 1997); *Wayne T. Palmer v. Barram*, 184 F.3d 1373 (Fed. Cir. 1999) (appeal dismissed).

Generally, these decisions are issued by panels of three judges. In rendering a decision each individual judge is required to explain the rationale for the decision and to set forth the facts on which the decision is based. In performing this function each judge is subject to the judgment of the other judges on the panel and appellate review by the judges of the Federal Circuit Court of Appeals. Notwithstanding this peer review, each judge is still required to render an independent judgment. This independence is protected by the guarantee that a judge's pay is not affected by the performance of this duty to render an independent judgment.

In addition, board judges are available to resolve disputes under voluntary alternative disputes resolution procedures. Sometimes the parties choose to waive their appeal rights and to have a single judge issue a binding decision; sometimes they choose to have a judge act as a mediator. It is a testament to the independence, fairness, and impartiality of the board judges that both parties are willing to have judges in those roles.

### *Performance Standards – Public Scrutiny – Conflicts of Interest*

The Contract Disputes Act contains performance standards for the boards of contract appeals. The judges are to act as quasi-judicial officers and are to issue fair and independent decisions on contract disputes between government agencies and contractors. Moreover, the boards are to “provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes” and are to issue decisions in writing. 41 U.S.C. § 607(e). With respect to accelerated (up to \$100,000) and expedited (up to \$50,000) appeals, the statute provides 180 and 120 day time limits for resolution, whenever possible. 41 U.S.C. §§ 607(f) and 608.

Unlike most jobs in the executive branch, these standards of performance are publicly known. Moreover, accomplishment of those objectives is subject to public scrutiny. The parties to a contract dispute, the government and the contractor, are aware of the manner in which disputes are resolved and have the opportunity to have a say as to which procedures are used. Moreover, decisions by board judges are subject to peer review by other judges, to motions for reconsideration by the parties, to appellate review by the Federal Circuit, and to public critique by members of the procurement community. This scrutiny goes to the quality of the judge's performance, but does not tread on the judge's independence. This public scrutiny is a procedure, which has two prongs. First, it guarantees that each party to the dispute will receive a fair and independent hearing; and second, it encourages achievement of the appropriate standard of performance.

Board judges are also subject to conflict of interest laws, rules, and regulations. For example, judges are prohibited from accepting gifts from parties that appear before them, must recuse themselves if they have a personal conflict of interest – such as a personal friendship with a party, must not express any more than an academic interest in a decision that they have issued (*Gulf & Western Industries, Inc. v. United States*, 230 Ct. Cl. 1 (1982)); and, must recuse themselves from cases in which they have a financial interest – such as employment or stock ownership.

## *Should there be Specific Performance Standards that Govern Pay Increases*

There is no reason for pay adjustments to be connected to the achievement of specific performance standards, other than to affect the performance of an individual judge. In addressing this issue it becomes necessary to ask what specific standards would be applied, who would establish the specific standards, who would determine if the individual judge has met the specific standards, what affect would the successful achievement of the specific standards have on an individual judge's pay, and why should a judge's performance be affected? We think that the answers to these questions reveal a classic conundrum.

## *What Specific Performance Standards Would Apply*

Ordinarily, specific performance standards are set with program objectives, goals, and resources all taken into consideration. If there are changes in program objectives, goals, or resources, performance standards can be adjusted. How would this process work in setting performance standards for judges? We see more questions than answers. The answers we find are not good ones.

Would the specific standards be related to quality of the decisions? If so, would quality be related to outcome? Would a good outcome be one that favored the government or one that favored the contractor? Would quality be related to writing style or length of a judge's opinion? How would these standards be applied to panel opinions, as opposed to those written by a single judge?

Would the standards be related to timeliness? If so, would timeliness be more or less important than quality? Would timeliness be related to resources available to a particular judge? Would timeliness be related to the difficulty of a case, the number of issues in a case, the number of days a hearing takes, the number of witnesses in a case, the number of documents in a case, whether travel was required, or whether the parties filed few or many pretrial motions?

Would a judge be penalized if many issues were discovered or discussed in a case, or would the judge be given credit for discussing and deciding many issues? Would a judge be penalized if the issues seemed relatively easy to decide, or would the judge be given credit if the issues seemed to be very difficult to decide? Would there be a catalogue of cases for which each was given a relative ranking of difficulty?

Would a judge be penalized for allowing many witnesses to testify, or would a judge be given credit if a large number of witnesses testified? Would a judge be penalized if a hearing lasted more days, or given credit because a hearing required many days of testimony?

Would a judge be penalized for allowing many documents into the record, or given credit for allowing the parties to submit all the documents they desired in order to make the record complete as required for appeal to the Federal Circuit?

Would the judge be penalized for allowing the parties to file many pretrial motions, or would the judge be given credit for having many motions to resolve? Would it make a

difference if the motions were oral or in writing? Would each motion be of equal weight for determining a judge's performance? Would one long complex motion be equal to many smaller succinct motions?

*Who would decide what the Specific Performance Standards Would Be*

Would one of the parties to the contract dispute decide what the specific performance standards would be? Would the contractor decide? Would the government agency decide? Which party would the judge be required to please? Would the government be willing to have its disputes decided by a judge whose pay was being determined by specific performance standards imposed by the contractor? Would a contractor be willing to have its disputes decided by a judge whose pay was being determined by specific performance standards imposed by the government? What does this do to fairness and impartiality?

*May OPM set the Specific Performance Standards*

OPM is a procuring agency whose contracts are subject to the Contract Disputes Act and whose disputes are decided by board judges. OPM is thus an interested party appearing before board judges. *E.g.*, see the following cases where OPM was a party: *Blue Cross and Blue Shield Association*, ASBCA No. 53632, 2004-1 BCA (CCH) ¶ 32,413; *Humana, Inc.*, ASBCA No. 49951, 2000-2 BCA (CCH) ¶ 31,142; *PCA Health Plans of Texas, Inc.*, 1998-2 BCA (CCH) ¶ 29,900. OPM can also be an interested third party in a contract dispute, as it was in a Government Printing Office contract dispute over the delivery of materials to OPM. *McDonald & Eudy Printers, Inc.*, GPO BCA 2-85, 1986 GPOBCA Lexis 40 (1986).

*No Party that has an interest in the Board Proceeding May Establish the Specific Performance Standards*

The legislative history of the Contract Disputes Act makes it clear that “in conducting proceedings and deciding cases [board judges] would not be subject to direction or control by procuring agency management authorities.” (Senate Report No 95-1118, pg 24) Could it be realistically expected that the losing party in a dispute will believe that a judge issued an independent decision, if the judge rules in favor of the party that decides whether or not that judge will receive a pay raise?

*May the Board Chairman or the other Judges on a Panel Determine whether a Judge should be given a Pay Raise?*

Putting aside the obvious question of who would decide on the pay of the Chairman, since each judge has only one vote on a decision, and since most decisions are issued by panels including the chairman, would an individual judge ever issue a decision contrary to a decision by a chairman if the chairman was in the position of deciding whether or not the individual judge received a pay raise? Could the individual judge's decision ever be viewed as independent under those circumstances? In order to prove independence, wouldn't a judge have to disagree with the chairman?

### *Pay Increases for Performance Creates a Conflict of Interest*

The judges' responsibility is to issue independent and fair decisions. In performing this function the judges do not have any superiors within the executive branch of government. The judges do not advocate, advance, or accomplish any particular agency program. Since the judges do not advocate, advance, or accomplish any particular agency program, it is not possible to give judges a performance award for achievement. They can only be paid for doing their job – which is to render independent decisions. Decisions are either independent or they are not. A judge thus does the job or does not. The job is not performed in degrees of independence. A board judge should be paid the judge's compensation or not – just as an Article I or and Article III judge is paid.

If a judge is to be personally compensated based on the judgment of another person as to whether or not the judge has satisfied specific performance standards, then the judges' personal interest in satisfying the judgment of that other person – in order to secure a favorable pay adjustment - will always be seen to be in conflict with the judge's duty to render a fair and impartial decision on a dispute between the government agency and the contractor. This would create an inherent conflict of interest between the judge's personal interest and his duty. An impossible situation!

### *Conclusion*

The SEA Board of Contract Appeals Judges Chapter opposes any pay adjustment that is tied to individual achievement of specific performance standards.